REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 179 OF 2010

JARED BWOCHA NYAMOSI.....APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

ERASTUS K. MUSERA.....2ND RESPONDENT

JUDGMENT

The Appellant herein was the plaintiff in the Lower court. He filed a plaint dated the 16th day of May 2005 which was later amended on 20th September, 2007. In the amended plaint he has claimed special damages in the sum of Kshs.70,830/-, General damages for pain and suffering and loss of amenities, future medical care, loss of earnings to the date of trial, diminished/ reduced earning, and the costs of the suit.

The claim was made against the Respondents. In the amended plaint, it is averred that on or about the 18th day of May 2004, the Appellant was lawfully standing on an island on Haile Selassie, Uhuru Highway Round about, waiting to cross towards Railways club when the 2nd Respondent whilst in the course of employment with the Ministry of Public Works, so negligently drove or managed motor vehicle registration number GK 001E that he caused the same to violently collide into the Appellant.

The particulars of negligence were set out in paragraph 5 of the amended plaint. The Appellant also pleaded the doctrine of Res Ipsa Loquior and averred that, by reasons of the matters pleaded in the plaint, the 1st Respondent is vicariously liable for negligence on the part of its servant, and/or driver, the 2nd Respondent. The Appellant contended that as a result of the accident, he sustained severe injuries and has suffered loss and damage. The particulars of injuries and those of special damages are set out in paragraph 6 of the amended plaint.

The Respondents denied the claim in their defence dated the 23rd November, 2005. They admitted that the subject vehicle belonged to the Ministry of Public Works and that it was being driven by the 2nd Respondent as the Ministry's authorized driver. The respondents did not deny the occurrence of the accident but refuted the manner in which the accident is alleged to have occurred. They blamed the Appellant for the accident and contended that the accident occurred when he was attempting to cross the road at a point far off from the designated zebra crossing, as a result of which he was knocked down by the aforesaid vehicle. The particulars of negligence on the part of the 1st Appellant are set out in paragraph 5 of the defence.

It is averred that if the Appellant suffered any injuries, loss or damage as pleaded and particularized in the amended plaint, he was the sole author of his misfortune. Liability is denied in toto.

At the hearing, the Appellant testified as PW2. It was his evidence that on 18th May 2004, he was on Haile Selassie Avenue and while standing on the island, he was hit by motor vehicle registration number GK 001E which came from behind. He lost consciousness and was assisted by members of the public.

He stated that the motor vehicle that hit him was on the wrong side and it hit him with its side mirror on his right hand as he had just started crossing the road. That he was taken to Kenyatta National Hospital where he was treated. He produced the treatment card and the payment receipts that he obtained from the said hospital. He was later admitted at St. Mary's hospital where he made further payment for treatment. He stated that he used to earn Kshs.5,500/- per month but after the accident he cannot work the way he used to work.

In cross-examination, he maintained that he had stopped at the island, waiting to cross the road, when he was hit by the subject vehicle on his right hand and that it was the side mirror that hit him.

PW2, one Nyamosi Macnold, in his evidence told the court that he witnessed the accident. He stated that the subject vehicle was being driven from Kenyatta National Hospital direction and it was offside when it hit the Appellant. He later went to Kenyatta National Hospital to see the Appellant and while there the subject vehicle took the patient to the said hospital and it is at that point that he took the details of the

driver and the motor vehicle. He told the victim that he had taken the details and he could call him if he needed him. He stated that the vehicle was speeding.

Doctor Washington Wokabi testified as PW4. It was his evidence that he examined the appellant on 13th Jun 2007 and prepared for him a medical report and on preparing the same, he relied on summary from Kenyatta National Hospital, X-rays and previous medical report by Professor Mbindyo.

His finding was that the Appellant sustained fractures to the right humerus. He stated that the fracture failed to unite after conservative treatment which required that the Appellant be operated on and metal plate be inserted. The plate was removed because it did not work.

It was his testimony that when he saw the Appellant after 3 years, the fracture had not re-united and the leg was weak. He estimated that the surgery for bone grafting would assist in uniting the fracture at a cost of Ksh.150,000/- which he said was based on his experience and that it was a rough estimate.

The Respondents did not call any witnesses in support of their case but they filed submissions.

The learned magistrate analyzed the evidence adduced by the witnesses and apportioned liability equally between the parties, assessed general damages at Kshs.450,000/- subject to contribution, disallowed the sum of Kshs.150,000 for future medical expenses, Kshs.70,830 for special damages, loss of earnings, loss of future earnings/diminished earnings but awarded costs and interest on the sum awarded.

The Appellant, being dissatisfied with the judgment, filed the Appeal herein and has listed 7 grounds of Appeal in his Memorandum of Appeal dated the 19th day of May, 2010. The Appeal is on both the liability and the quantum of damages awarded to the Appellant. It is important at this point to note that he has not appealed against the award on general damages. The Appeal is on failure by the learned magistrate to award special damages, future medical care, loss of earnings and reduced future earning capacity.

The Appeal was disposed of by way of written submissions which this court has duly considered. The Appellant in his submissions has reiterated the evidence that he adduced in the trial court and has urged the court to find the Respondent fully liable for the accident. He has contended that the learned magistrate erred in apportioning liability equally between the parties. The Respondents on their part have asked the court not to interfere with the finding of the trial court on liability. The Respondents relied on an extract from **Charles Worth and Percy,** on negligence wherein, the writer discussed the principle of contributory negligence thus;

> **"The expression contributory negligence applies wholly to the conduct of the Appellant. It means that there has been some act or omission on the Appellant's part which has materially contributed to the damage".**

It was submitted that the Appellant, by crossing the road at a roundabout, was careless and he endangered his own safety. The Respondents also asked the court to note that the police officers who assisted in taking the Appellant to Kenyatta National Hospital were not called as witnesses in the case and that no sketch plan was produced that could guide the court in assessing liability. It was contended that the Appellant greatly contributed to the occurrence of the accident.

On the issue of liability, the court notes that the Respondents did not call any witness during the trial before the lower court. The Appellant and his witness PW3 gave evidence that blamed the driver of the subject vehicle for the accident as he was driving on the wrong side of the road. It was also the evidence of PW3 that the driver was overspeeding. The Respondents and the trial court put a lot of emphasis on the Appellants evidence in cross-examination where he stated that he had just started crossing the road when the accident occurred. I have perused the plaint and the evidence in chief by the Appellant. It is pleaded that he was standing on the Island when the accident occurred. This is supported by his evidence in chief. From that evidence, I make a finding that the Appellant was standing on the island when he was hit by the motor vehicle. It is worth noting that though the Counsel for the Respondent attributed negligence to the Appellant in the defence, no evidence was offered to prove the allegations of negligence against him. It is not enough for a party to plead contributory negligence. Evidence has to be offered to assist the court in apportioning liability between the parties if there is sufficient evidence on the basis of which the court can do so. In this case, there was none. I therefore find that the Respondents were fully blamed for the accident.

On special damages, the Appellant submitted that the same were pleaded and proven and the learned magistrate ought to have awarded the same. The same were not awarded for the reason that it was paid by the church on behalf of the Appellant. A perusal of the amended plaint reveals that special damages in the sum of Kshs.70,830 were pleaded. The court has looked at the receipts that were produced during the hearing. They total to Kshs.62,460/-. In the submissions, counsel for the Appellant has asked the court to grant the same basing her argument on the case of **George White Vs. Jubitz Corporation (Supreme Court of the State of Oregon)2009** where the court observed thus;

> **"The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor."**

> **"The common-law collateral source rule does not concern itself with whether a plaintiff actually obtains a "double recovery." The rule permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third party and to do so without regard to whether the plaintiff has purchased, earned, or must repay those third-party benefits".**

This case was quoted with approval in the Kenyan case of **Leli Chaka Ndoro Vs Maree Ahmed and S.M. Lardhi, Civil Appeal No. 22 of 2015 (High Court of Kenya at Malindi)** where Hon. Chitebwe found that the trial court erred in dismissing a claim on special damages because part of the medical expenses was paid by an insurance company.

The Appellant also relied on the case of **Donnelly W. Joyce (1974) QB 454** where the court made it clear that whether the plaintiff's medical expenses were financed, he was entitled to recover in respect of them and whether he had any liability legal or simply moral to repay anyone in respect of the medical expenses was immaterial.

I wholly concur with the submissions by the counsel for the Appellant and do find that the Appellant is entitled to special damages that he incurred as result of the accident.

On the trial court's failure to award costs of future or further medical expenses, the same was pleaded in the amended plaint. I concur with the holding in the case of **Tracom Limited & Another Vs. Hassan Mohammed Adan (2009) eKLR** that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it……."

In this case PW1, Doctor Washington Wokabi, in his evidence and in the medical report for the Appellant has opined that the Appellant shall require future medical expenses of Kshs.150,000 which he has itemized in the medical report. In justifying the same, he stated that the same was because the fracture has failed to unite and if left alone it will never unite. The Appellant will need to be operated on and a plate and bone grafting done. According to him, the estimate on costs is based on his experience and it is a rough estimate. I find that the trial court ought to have awarded future medical expenses because the same was pleaded and the doctor justified the expenses.

On lost earnings upto the date of trial and future or diminished earning capacity, the Appellant testified that he was a mason and after the accident he could not continue with the same job. He stated that his monthly income was Kshs.5,500/- but did not have a payslip. The court was asked to take notice of the fact that many Kenyans who are employed do not have payslips.

Without prejudice to the above submissions, it was submitted that the Regulation of Wages and Conditions of Employment Act as at the date of the trial in the year 2010, provided for a sum of Kshs.5,000/- as the minimum wage for casual labourers. The accident herein occurred on 18th May 2004 whereas the case commenced in 2010. That by the time the case was heard, a period of almost 6 years had lapsed. The Appellant asked the court to award a total of Kshs.396,000 based on the Kshs.5,500x12x6.

The Respondents did not address the court on this issue. The court has been asked to take judicial notice of the fact that most Kenyans are employed but have no payslips. I do take judicial notice of that fact and find that the Appellant is entitled to an award under this head. A sum of Ksh.5,000 is reasonable and modest. This translates to Kshs.360,000/- for the six years that the matter lasted in court.

On loss of future and/or diminished earnings, the Appellant submitted that the fracture has failed to unite and therefore he cannot continue with his masonry work that he was doing before the accident.

The Appellant contended that, were it not for the accident, the Appellant who was aged 36 years then, would have worked upto the age of 60 years. Counsel for the Appellant has asked the court to apply a multiplier of 24 years and a multiplicard of Kshs.5,500 making a total of Kshs.1,584,000/-. He has relied on the case of **Alice O. Alukwe Vs. Akamba Public Road services Ltd. & 3 others (2013) eKLR** where a multiplier of 30 years was adopted for a deceased aged 24 years.

On the part of the Respondents, it was submitted that the Appellant continues to draw earnings from his business in cereals. It was contended that the Appellant failed to show that what he is earning is less compared to the income he used to make prior to the accident or even provide a correlation between the injuries sustained and his income.

The court has considered the submissions of the parties with regard to this aspect of the claim. I fully concur with the Respondents that the Appellant did not offer any evidence to prove that his cereals business was earning him less than what he used to earn as a mason. It is not enough for a party to write down the particulars and throw them at the head of the court saying this is what I have lost. See the case of **Leli Ayub Omari Sabhani (supra)** where the court noted

> **"The appellant must understand that if they bring action for damages it is for them to prove such damages. It is not enough to write down the particulars and so to speak, throw them at the head of the court saying "this is what I have lost". I ask you to give me these damages" They have to prove it.**

I also note that the age of the Appellant was not pleaded and during his evidence in chief, he did not state his age.

In view of the aforegoing, I find that the Appellant did not tender evidence to proof his claim under this head and the learned magistrate was right in disallowing the same.

In the end, the Appeal partially succeeds and it is allowed in the following terms;-

Liability – 100%

General Damages – 450,000/-

Special damages – 62,460/-

Lost earnings – 360,000/-

Diminished earnings – nil

Costs of future medical expenses – 150,000/-

Special damages to earn interest from the date of filing of the plaint and General damages from the date of Judgment.

The Appellant shall get half of the costs of both the Appeal and the Lower Court.

It is ordered.

Dated, Signed and Delivered at Nairobi this 27th day of September, 2018

……

L. NJUGUNA

JUDGE

In the presence of:

.....*For the Appellant*

.....*For the Respondents*